No. 15,917

In the United States Court of Appeals for the Ninth Circuit

R. B. FRASER; R. B. FRASER, INC., a corporation; R. B. FRASER, JR.; FRASER LIVESTOCK COMPANY, a corporation; and CHARLES FRASER, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

Upon Appeal from the United States District Court for the District of Montana

BRIEF FOR THE UNITED STATES, APPELLEE

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OPINION BELOW

The opinion of the court below is reported at 156 F.Supp. 144. The findings of fact and conclusions of law appear at pages 73-84 of the printed record.

JURISDICTION

This is an appeal from the judgment of the district court entered November 21, 1957 (R. 108-111). Notice of appeal was filed December 16, 1957 (R. 111). The jurisdiction of the district court of this

suit by the United States rested on 28 U.S.C. sec. 1345. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. sec. 1291.

STATUTES INVOLVED

The Act of June 30, 1834, 4 Stat. 730, as amended R.S. sec. 2117, 25 U.S.C. sec. 179, provides:

> Every person who drives or otherwise conveys any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of $1 for each animal of such stock. This section shall not apply to Creek lands.

The Act of June 18, 1934, 48 Stat. 984, 986, as amended 25 U.S.C. sec. 466, provides:

> The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

25 C.F.R. sec. 71.1 provides: [1]

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[1] The numbering system of Title 25 of the Code of Federal Regulations was revised in 1957. Former section 71 was changed to 151. The subsections remain the same. For consistency with proceedings in the trial court, the old system will be followed herein.

> *General authority.* It is within the authority of the Secretary of the Interior to protect Indian tribal lands against waste. Overgrazing, which threatens destruction of the soil, is properly considered waste. Subject to regulations authorized by law, the right exists for Indian tribes and individual Indians to lease or grant permits upon their own tribal land or individual allotments.

25 C.F.R. sec. 71.3 provides, in part, as follows:

> *Objectives.* It is the purpose of the regulations in this part to aid the Indians in the achievement of the following objectives:
>
> (a) The preservation through proper grazing practice of the forest, forage, land, and water resources on the Indian reservations, and the building up of these resources where they have deteriorated.
>
> * * * *

25 C.F.R. sec. 71.21 provides, in part, as follows:

> *Trespass.* The owner of any livestock grazing in trespass on restricted Indian lands is liable to a penalty of $1 per head for each animal thereof together with the reasonable value of the forage consumed and damages to property injured or destroyed.

The followings acts are prohibited:

> (a) The grazing upon or driving across any restricted Indian lands of any livestock without an approved grazing or crossing permit, except such Indian livestock as may be exempt from permit.
>
> (b) Allowing livestock not exempt from permit to drift and graze on restricted Indian lands without an approved permit.
>
> * * * *

QUESTIONS PRESENTED

1. Whether appellants' acts in allowing their livestock repeatedly to drift and graze on Indian land, without consent, subjected them to the trespass penalty provided by Congress in 25 U.S.C. sec. 179 for driving or otherwise conveying livestock onto such land.

2. Whether the United States was the proper party plaintiff to bring suit to enjoin trespass on Indian land leased to a non-Indian lessee.

3. Whether a provision in the grazing contract for payment of 50 percent of the normal fees, in addition to the regular charges for each head of stock in excess of the authorized number, was a penalty or provision for liquidated damages.

STATEMENT

This action was instituted by the United States in its sovereign capacity for the use and benefit of the Indians of the Crow Indian Reservation and the Crow Indian Tribe in Montana (Fdg. I, R. 74). Title to the lands involved herein was at all times in the plaintiff in trust for the benefit of the members of the Crow Tribe, subject only to duly approved leases and grazing permits (Fdgs. I, II, IV; R. 74-75). The complaint in nine counts sought recovery of the statutory penalty of $1.00 per head of livestock for trespass by appellants, defendants below, on certain Indian land; an injunction to prevent future acts of trespass; and damages measured by regular grazing fees plus 50 percent thereof for overgrazing in violation of the appellants' grazing permit (R. 3-17).

The facts as found by the court below may be summarized as follows:

The Government alleged (R. 6-9), and the court found on the basis of the evidence presented, that on three separate occasions appellants' livestock had drifted and grazed on Indian lands on which appellants did not have a lease, permit, license or privilege; [2] the court further found that the animals were allowed to drift and graze upon the Indian lands wrongfully, wilfully and without the consent of the Indian owners (Fdgs. V, VII, VIII; R. 76-77). The court concluded that appellants' cattle were in trespass in violation of 25 U.S.C. sec. 179 and 25 C.F.R. sec. 71.21, a duly promulgated and existing regulation of the Secretary of the Interior (Concl. II, R. 81); and that appellants were liable in the amount of the penalty as set forth in that statute and repeated in the regulation (Concls. IV, VI, VII; R. 82).[3]

With respect to injunctive relief, the court further found that over a period of years some 12 instances had occurred wherein appellants had allowed their stock to drift or graze upon Indian trust land upon which appellants had no permit, lease or privilege, knowingly and wilfully, without consent, and in defiance of the appellee and its officers and employees

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[2] This land was under lease by the Indians to a non-Indian lessee, Cormier Bros.

[3] Recovery for an alleged trespass occurring in 1943 was denied on the grounds that the time for an action for a penalty had run and the suit was barred by the provisions of 28 U.S.C. sec. 2462 (Concl. III, R. 81). This point is not raised on appeal.

(Fdgs. IX, X, XII; R. 77-78). The court found that continued trespassing threatens overgrazing, that overgrazing causes permanent damage to the inheritance of the land and that the resulting damage is difficult of exact computation (Fdg. XIII, R. 78-79). Accordingly, the court concluded that, to prevent a multiplicity of suits and because the Government had no plain, speedy and adequate remedy at law, it was entitled to a permanent injunction, enjoining appellants from allowing livestock to drift and graze on Indian trust lands without a permit (Concl. VIII, R. 82-83).

As to damages for overgrazing on permitted land, the court found that the Crow Indian Agency, on November 17, 1950, had issued a grazing permit (R. 18-19) to R. B. Fraser, on behalf of all appellants, by which they were permitted to graze livestock, not to exceed a designated number, on a range unit which included Indian trust lands (Fdgs. XIV, XV; R. 79-80). Fraser signed and accepted the permit together with the stated conditions and the Range Control Stipulations annexed thereto (R. 23-37). The permit was to run for a period beginning December 1, 1950, to November 30, 1955. The maximum carrying capacity of the unit, which included privately leased or owned lands and Indian lands, was set forth with the annual fees due therefor.

The court found that on two occasions in the same year appellants had exceeded the maximum number of livestock permitted on the unit (Fdg. XVI, R. 80). Paragraph 3 of the Range Control Stipulations provided that, "if the number authorized is exceeded,

without previous authority, the permittee will be required to pay in addition to the regular charges as provided in the permit, a penalty equal to 50 per cent thereof for such excess stock * * *" (R. 24). Pursuant to this provision, the Government sought recovery in two counts for payment of the regular charges and a sum equal to 50 percent thereof for the excess stock on each of the two occasions of overgrazing (Counts Seven and Eight, R. 11-14). The court concluded that the Government was entitled to recovery for only one occasion of overgrazing during the year, and arrived at the amount of recovery pursuant to the foregoing provisions as liquidated damages on the basis of the largest number in excess at any one time during the year (Concl. IX, R. 83). In its opinion, the court explained that the provision was actually for liquidated damages and was not a penalty, because it was "a reasonable forecast of just compensation for the harm caused by the breach" (R. 104). It held that recovery could not be had for each overstocking, because it was based on the contract provision for year-round grazing (R. 104).

Finally, the court found that appellants had failed to pay the grazing fees set forth in the permit for the month of December 1954 (Fdg. XVII, R. 80), and concluded that they were liable for such charges (Concl. X, R. 83).

Judgment was entered pursuant to the findings and conclusions on November 21, 1957, in the amounts of $105.00 as trespass penalty, $1,262.93 as damages for overgrazing and $114.64 for unpaid grazing fees, plus interest (R. 108-111).

SUMMARY OF ARGUMENT

1. Appellants have argued that a wilful intent to commit trespass is necessary under 25 U.S.C. sec. 179 and cite several cases to prove their point. However, each of their cases can be clearly distinguished on the grounds that (a) they do not relate to a statutory trespass, and (b) none of the cases declare, even in the absence of statute, that, as to Indian reservations or reserved public lands, wilful intent must be present. Assuming, *arguendo*, that wilful intent is necessary, it is present here from the repeated trespasses by appellants in careless disregard for the property rights of adjacent owners, and in defiance of the government officials. The continuing nature of the trespasses here justify a finding of wilful intent. While there is no showing that appellants drove their cattle upon the Indian land, they could and should have reasonably anticipated that their livestock would drift onto these lands and subject them to the penalty prescribed by statute.

Appellants contend that the regulation, 25 C.F.R. sec. 71.21, is invalid because it goes beyond the scope of the Act. However, in the first place, appellants have failed to bear the burden required to show the invalidity of the regulation. Moreover, it is clear from the wording of the regulation that it is not inconsistent with the Act, being plainly within the authorized objectives of Congress.

2. Even though the land was under lease to a non-Indian lessee, the Government is a proper party plaintiff because an injury to the reversionary interest through trespass of a third party is actionable by the

landlord, and it is indisputable that the Government may maintain the action for the landlords here as trustee for its Indian wards.

3. The provision for payment of the regular charges plus a "penalty" equal to 50 percent thereof for grazing of stock in excess of the authorized number under the permit is a provision for liquidated damages. It is not a penalty because it is a reasonable forecast of just compensation for the harm caused by the breach, and the harm is one that is incapable or very difficult of accurate estimation. The term "penalty" used in the contract is not controlling; the court must look to what the parties intended. The intention was that the provision was for liquidated damages, for it was made directly proportionate to the damage sustained.

ARGUMENT

I

Appellants' Acts Constituted Trespass Within the Meaning of 25 U.S.C. Sec. 179 and 25 C.F.R. Sec. 71.21

Appellants have made two points in their argument seeking to establish that they are not liable for trespass damages. In their first point, it is argued that the fact that their livestock was allowed to drift onto non-permitted lands did not constitute trespass within the meaning of 25 U.S.C. sec. 179. Secondly, appellants argue that the definition of the acts constituting trespass stated in the Department of the Interior regulations, 25 C.F.R. sec. 71.21, goes beyond the scope of section 179 and is void as an unauthorized enlargement of the statute.

A. ***A wilful intent is not required to constitute trespass under 25 U.S.C. sec. 179, but, even so, such intent exists here.***

1. *A wilful intent is not necessary:*—Appellants have taken the position that the terms "driving or otherwise conveying" livestock, as used in section 179, mean that some action must be taken by the livestock owner requiring a wilful intent to convey the animals onto non-permit lands, and that since appellants' actions in not preventing the cattle from drifting could be more aptly described as "passive," they contend that they have not committed a trespass within the meaning of the Act. It is the Government's position, on the other hand, that trespass is committed within the meaning of the act, as reasonably interpreted by the regulations, where cattle are allowed to drift onto non-permit lands. Appellants seek to support their argument that an element of wilfulness is necessary to establish a trespass under section 179 by two cases: *Light* v. *United States*, 220 U.S. 523 (1911); *Shannon* v. *United States*, 160 Fed. 870 (C.A. 9, 1908). Those decisions do not support appellants' contentions.

The *Light* case, *supra*, was an action to enjoin a rancher from pasturing his cattle on public lands specifically set aside as a forest reserve in violation of certain rules and regulations established by the Secretary of the Interior for the protection of the forest reserves. It appears from the facts in that case that it was the natural proclivity of cattle turned loose on adjacent private lands to drift onto the forest reserve in search of better grazing and water. The court said at p. 538: "It appears that the defendant

turned out his cattle under circumstances which showed that he expected and intended that they would go upon the Reserve to graze thereon." The *Shannon* case, *supra*, arose in the same Montana federal district court as the instant case. There, also, the Government sought to enjoin a rancher from pasturing his cattle on forest reserve lands. The facts indicated that the rancher's land was bounded on three sides by the forest reserve. "Of course," the court said, "he knew they [the cattle] would not and could not remain in the inclosure, for there was no water there, nor sufficient pasturage for so large a herd. They did as he evidently expected them to do. They went through the convenient openings which he had made in his fence for that purpose." These two cases were construed in *United States* v. *Thompson*, 41 F.Supp. 13 (E.D. Wash., 1941), as follows:

> The defendant attempts to distinguish the two cases on the ground that they both involved actual or intended trespasses upon the part of the owners of the cattle. While that is true, and, strictly speaking, the two cases can be of value in cases of similar import, nevertheless I am convinced from the language of the two opinions they compel acceptance of the conclusion that *the holdings would have been the same without evidence as to intention of trespass.* [Emphasis added.]

As these decisions and common knowledge show, where there is unfenced open range, drifting of livestock is almost inevitable unless affirmatively prevented, and section 179 must be viewed with that set-

ting in mind. Thus, that statutory definition of a trespass includes all the elements required to establish liability thereunder and a showing of wilful intent is not included as one of them.

2. *A wilful intent was present:*—The trial court found that there was a wilful intent on the part of appellants to allow their livestock to drift and graze on the Indian lands involved without consent (Fdgs. V, VII, VIII; R. 76-77). The finding is amply supported by such substantial evidence as the repeated acts of invasion (Fdgs. V, VII, VIII, X, XII; R. 76-78) and the ignoring and defiance of many requests for removal by the government officials (Fdg. XI, R. 78).

In *United States* v. *Illinois Cent. R. Co.*, 303 U.S. 239 (1938), the Supreme Court presented an excellent definitive statement, which was relied on by the court below, relative to the meaning of the term "wilful." "Our opinion in *United States* v. *Murdock*, 240 U.S. 389, 394, shows that it ["wilfully"] often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.' " And, quoting from *St. Louis and S.F. R. Co.* v. *United States*, 169 Fed. 69, 71 (C.A. 8, 1909), the court proceeded to state: " 'So, giving effect to these considerations, we are persuaded that it means purposely or obstinately and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements.' "

It is appellants' position that, absent a showing of wilful intent, the single fact the cattle were on non-permit land is not violative of the statute. However, something more than simply being on the land was present in this case. Appellants have completely overlooked the fact that their cattle were found on the land far more than the number of times which would invite a conclusion of occasional straying. And it is on these facts of repeated and innumerable instances of drifting that a wilful intent is established—clearly within the statement in the *Illinois Central* case, *supra.*

B. *Section 71.21 of the regulations does not broaden the scope of the Act.*

Proceeding to the second half of appellants' argument, to wit, that section 71.21 of the regulations is invalid because it changes the law as set forth in section 179, it should be noted initially that the general rule is well established that one attacking a regulation bears the burden of showing its invalidity; and this burden can only be carried by showing, as a minimum, that the regulation is inconsistent with the underlying statute or is unreasonable or inappropriate. *Montana Eastern Limited* v. *United States*, 95 F.2d 897 (C.A. 9, 1938); *United States* v. *Watkins*, 173 F.2d 599 (C.A. 2, 1949), affirmed 338 U.S. 537; *McMahon* v. *Ewing*, 113 F.Supp. 95 (S.D. N.Y., 1953); *Blackmar* v. *United States*, 120 F. Supp. 408 (C.Cls. 1954). It could hardly be more obvious that with only the statement that the Department of the Interior has legislated, and no more, appellants have completely failed to carry this burden (Br. 10).

Moreover, the attention of the court is directed to the Act of June 18, 1934, 48 Stat. 984, 986, as amended 25 U.S.C. sec. 466 (p. 2, *supra*), where the Secretary of the Interior was authorized by Congress to promulgate such rules and regulations "as may be necessary to protect the range from deterioration." Title 25 C.F.R. sec. 71.1 (now sec. 151.1, p. 3, *supra*) states, "It is within the authority of the Secretary of the Interior to protect Indian tribal lands against waste. Overgrazing, which threatens destruction of the soil, is properly considered waste." And in Title 25 C.F.R. sec. 71.3 (now 151.3, p. 3, *supra*), the objectives of the regulation include: "(a) The preservation through proper grazing practice of the forest, forage, land, and water resources on the Indian reservations, and the building up of these reservations where they have deteriorated."

25 U.S.C. sec. 179 (p. 2, *supra*) provides that "Every person who drives or otherwise conveys any * * * cattle * * * to range and feed" on Indian lands without consent is liable to a penalty of one dollar per head of such stock.

Pursuant to the foregoing authority, and within the stated objectives of the regulations, the Secretary issued regulation 71.21 (now 151.21, p. 3, *supra*). Section 71.21 provides that: "The owner of any animal grazing in trespass on any restricted Indian land, is liable to a penalty of $1 per head for each animal thereof, * * * ." The regulation lists thereunder the following acts as prohibited:

> (a) The grazing upon or driving across any restricted Indian lands of any livestock without

an approved grazing or crossing permit, except such Indian livestock as may be exempt from permit.

(b) Allowing livestock not exempt from permit to drift and graze on restricted Indian lands without an approved permit.

It is clear that section 71.21 is within the scope of the authorizing act (25 U.S.C. sec. 466) and consistent with the foregoing statements of the objectives of the Secretary's grazing policies. Suits to enjoin trespass have upheld similar regulations in *United States* v. *Johnston*, 38 F. Supp. 4 (S.D. W.Va., 1941), and *United States* v. *Travis*, 66 F.Supp. 413 (W.D. Ky., 1946). Thus Congress has provided the outline and prescribed the penalty; it was left to the Secretary to fill it in. *United States* v. *Grimaud*, 220 U.S. 506 (1911). Section 71.21 is entirely consistent with section 179 of the Act. The statute described the wrongful act as one who "drives or otherwise conveys." The regulation amplified these terms for purposes of clarification. There appears to be no reasonable difference in effect between the terms "otherwise conveys" and affirmatively "allowing to drift." If there is a distinction, it is one of degree only and is hardly such as to warrant a conclusion of inconsistency. *United States* v. *Morehead*, 243 U.S. 607 (1917); *Boske* v. *Comingore*, 177 U.S. 459 (1900). Furthermore, it is readily apparent that the broader and more general term used in the statute includes that used in the regulation. The conclusion cannot be other than to uphold the validity of the regulation.

C. *Fence laws have no application to the commission of trespass under 25 U.S.C. sec. 179.*

Appellants have presented a series of cases and arguments to the effect that the open-range law requiring a landowner to fence out trespassing cattle is applicable to this case. However, it is obvious that this contention is clearly in error. Appellants have not cited a single authority to the effect that 25 U.S.C. sec. 179 requires the Government to erect a fence to prevent a rancher from "driving or otherwise conveying" his cattle onto Indian lands. Section 179 was originally enacted by the Act of June 30, 1834, 4 Stat. 730, and a study of the annotated cases reveals no instance where such a defense has been raised during the entire 120 years that the statute has been in effect. The reason for the absence of such a defense is apparent. Congress has paramount power to legislate for the protection of the lands of its Indian wards. (See, *infra,* pp. 16-17.) It has legislated here and thereby preempted the field to the exclusion of any conflicting local law. Clearly, then, where the act prohibited by the statute is proven, fencing laws have no application.

II

The United States Is A Proper Party Plaintiff

There can be no question of the right of the United States to initiate a suit for the protection of the rights and property of its Indian wards. It has been repeatedly stated that, "as guardian of such Indians, the Government stands charged with all the obligations attending such a relationship. It not only has

the power to institute actions to preserve the rights of its wards, * * * but it is its duty to do so when those rights are threatened." *Mashunkashey* v. *United States*, 131 F.2d 288 (C.A. 10, 1942), citing *Heckman* v. *United States*, 224 U.S. 413 (1912).

Appellants contend that the United States was not the proper party to institute this action, but that the white lessee, Cormier Bros., should have brought this suit since the trespass was a violation of their possessory interest. In support of this position, appellants rely upon a ruling in *LaMotte* v. *United States*, 256 Fed. 5 (C.A. 8, 1919), affirmed 254 U.S. 570, that a lessee of an Indian lessor was the proper party to bring suit to enjoin trespass on the unfenced leasehold. The court decided this question on the express basis that under the facts of that case; "Such trespass does not injure the freehold nor affect the allottee lessor." It is readily apparent from that statement that, unlike the present case, there was no finding of a permanent injury to the inheritance.

The instant case is plainly to the contrary on that point; it was alleged, proved by evidence, and found by the court, "* * * that overgrazing causes permanent damage to the inheritance of the land, * * *. Continued trespassing by defendants threatens overgrazing and consequent irreparable damage and injury to the inheritance of the lands" (Fdg. XIII, R. 78). As to the right of the landlord to sue, "An injury to the trees or timber on the demised premises may be an injury to the reversion for which the landlord may sue." 32 Am. Jur. 93, Landlord & Tenant, sec. 80. "The usual remedy of a landlord whose re-

versionary interest is injured by another's wrongful act is by way of an action at law for damages, although in a case of injury by reason of the maintenance of a nuisance by a third person, he may bring an action in equity to abate the nuisance." 32 Am. Jur. 96, Landlord & Tenant, sec. 86.

Clearly, therefore, there can be no disputing the right of the United States to maintain an action to enjoin trespass of Indian lands. It was well stated in *United States* v. *Colvard*, 89 F.2d 312 (C.A. 4, 1937), that:

> * * * for the protection of the lands which are the subject-matter of the trust, the United States may ask an injunction against repeated trespasses which adjacent landowners threaten to continue, the decision in the Wright case [*United States* v. *Wright*, 53 F.2d 300 (C.A. 4, 1931)] virtually determines it. That case establishes the right of the United States as trustee of the lands to seek injunction for the protection of the interest of the Indians therein; and it is, of course, well settled that injunctive relief is proper against continuing trespass or against repeated trespasses where there is threat of continuance and the remedy at law is inadequate or multiplicity of suits would be avoided by equitable remedy. [Citations.]

It follows that in the instant case the United States has the power to bring suit for the protection of the rights of its Indian wards for injury to their reversionary interests.

III

The "Penalty" Provision In the Range Control Stipulations Was Correctly Construed As A Provision for Liquidated Damages

Under the terms of the grazing permit, appellants were limited to grazing a designated number of head on the permitted land. The Range Control Stipulations, which were made a part of the permit, provided that, "if the authorized number were exceeded without previous authority, the permittee will be required to pay, in addition to the charges as provided by permit, a penalty equal to 50 per cent thereof for such excess stock and the stock will be held until full settlement has been made" (Range Control Stipulations, Par. 3; R. 24). In Counts Seven and Eight of the Government's complaint recovery was sought for such excess grazing fees for overstocking.

Appellants contend that the "penalty" provision was in fact a penalty, and in the absence of the Government's proof of actual damages, there can be no recovery. The Government contended that the provision was actually for liquidated damages. In sustaining the Government's position, the court wrote an exhaustive opinion which is hereby adopted as to this point and made a part of this brief (R. 96-106). In holding that the provision was for liquidated damages, the court stated that, "The excess charge is a reasonable forecast of just compensation for the harm caused by the breach, and the harm is one that is incapable or very difficult of accurate estimation." Thus, it falls within the exception to the general rule against determining damages in advance of breach.

Restatement of the Law of Contracts, sec. 339. The court observed that under section 71.1 of the regulations promulgated by the Secretary of the Interior "overgrazing which threatens destruction of the soil is properly considered waste, * * * and unquestionably such harm in any particular case would be difficult of accurate estimation" (R. 102). The court had previously found that overgrazing causes permanent damage and that the damages were difficult to determine (Fdg. XIII, R. 78-79).

The opinion also quoted extensively from the case of *United States* v. *Bethlehem Steel Co.*, 205 U.S. 105 (1907), wherein the Supreme Court of the United States, faced with a similar problem, stated, "The question always is, what did the parties intend by the language used?" Appellants raise the point in their brief that the word "penalty" is used in the stipulation and that it was the intention of the parties to regard it as such. The court in the *Bethlehem* case, *supra*, had this to say regarding a similar contention:

> * * * It is true that the word "penalty" is used in some portions of the contract * * *. The word "penalty" is used in the correspondence, even by the officers of the government, but we think it is evident that the word was not used in the contract nor in the correspondence as indicative of the technical and legal difference between penalty and liquidated damages.

It was obvious to the court, on the basis of the evidence before it, that the parties intended the provision to be liquidated damages. This view is supported by the surety requirement provision of sec.

71.17 of the regulations, to apply such surety bond or deposit "as liquidated damages in the event of any breach of the permit."

Appellants' concluding statement on this question, furthermore, is grossly in error. While correctly stating the law that a fixed sum bearing no proportional relation to damage will be construed as a penalty, appellants state, without any basis in fact whatsoever, that "* * * the amount asked for relief under the complaint is disproportionate to the damages sustained * * *" (Br. 13). Nothing could be more directly related to the damage sustained than a prorated charge based on each head of cattle in excess of the authorized number.

Thus, as the foregoing authorities show, since the type of damage here is uncertain and difficult of ascertainment and since it is proportionately related to the degree of damage inflicted by each animal, the district court correctly held that the provision involved was for liquidated damages and not a penalty. See also *Steffen* v. *United States*, 213 F.2d 266 (C.A. 6, 1954).

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the court below should be affirmed.

Respectfully submitted,

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